U.S. Department of Labor

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Date: June 14, 2000

Case No.: 1999-STA-21

In the Matter of:

RONALD C. STAUFFER,
Complainant

against

WALMART STORES, INC.,
Respondent.

Before: LARRY W. PRICE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of §405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. §31105 (1994) , and the regulations at 29 C.F.R. Part 1978. Complainant Ronald C. Stauffer (Stauffer) claimed that his employer, Respondent Wal-Mart Stores, Inc. (Wal-Mart), violated §405 when it discharged him on August 8, 1998, for insubordination due to refusal of a dispatch work assignment.

PROCEDURAL HISTORY

On September 23, 1998, Stauffer filed a timely complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) pursuant to 29 C.F.R. §1978.102 (1999). He claimed that Wal-Mart had violated STAA §405 by discharging him in reprisal for his refusal, on the basis of fatigue, to wait until an empty trailer was available for him to exchange with his full trailer.

In accordance with 29 C.F.R. §1978.104, OSHA's Assistant Secretary issued written findings on January 27, 1999, concluding that Wal-Mart's discharge of Stauffer did not violate STAA §405. Stauffer filed timely objections to the Assistant Secretary's written findings and requested a hearing under 49 U.S.C. §31105(b)(2)(B) and 29 C.F.R. §1978.105.

Wal-Mart moved for summary decision under 29 C.F.R. §18.40 (1999). On July 6, 1999, I issued a R. D. & O. which recommended granting Wal-Mart's motion for summary decision. Pursuant to 29 C.F.R. §1978.109(a), I forwarded my R. D. & O. to the Administrative Review Board for final consideration. On November 30, 1999, the Board vacated the R.D. & O. and remanded the case for hearing. The hearing was held in Jackson, Mississippi, from February 29, 2000, until March 2, 2000.

FACTS

Stauffer was at all times material herein, an "employee" as defined in 49 U.S.C. § 31101(2). From July 12, 1987 until August 8, 1998, Stauffer was employed by Wal-Mart to operate commercial motor vehicles in interstate commerce with a gross vehicle weight rating of 10,001 pounds or more. (TR4). Stauffer operated vehicles from Wal-Mart's distribution center in Brookhaven, Mississippi, as part of Wal-Mart's private trucking fleet. (TR58).

In 1998, Paul Darwin was Wal-Mart's Private Fleet Manager at Brookhaven. Darwin supervised dispatchers and drivers. (TR9001-01). George Randle was an operations manager at Brookhaven in the summer of 1998. (TR851). Stephanie Thornhill was a "flex coordinator" with dispatch responsibilities at Brookhaven in 1998. (TR819).

Wal-Mart truck drivers primarily move trailers loaded with merchandise from Wal-Mart distribution centers to Wal-Mart retail stores in the geographic area serviced by each particular distribution center. (TR358). Wal-Mart distribution centers and their drivers treat the retail stores as the customer. (TR851, 903, 909).

Stauffer began a typical work day for Wal-Mart at a store where he had spent the previous night in the sleeper of his truck tractor. (TR56-57). Stauffer typically slept from 11:00 p.m., give or take an hour, until seven or eight in the morning. (TR96). In the morning, after inspecting his equipment, he usually returns to the distribution center with the empty trailer. (TR57-58; TR104). This would normally leave several hours of down time before Stauffer could leave with that evening's deliveries. Since Stauffer lived over 100 miles from the distribution center, he did not return home. The distribution center had facilities for showering and personal hygiene and a fitness center. The distribution center also had areas for taking meals, sleeping and for personal business. Other time at the distribution center may be spent in meetings and waiting for paperwork. (TR97-102).

Drivers report their hours of service to Wal-Mart daily. Based upon the available driving time and the estimated travel time between the distribution center and the stores, a coordinator plans the drivers' dispatches. (TR821; TR829). Scheduling of dispatches does not consider the time a driver

has been awake. (TR840). Wal-Mart usually informs a driver of his daily dispatches as he returns to the distribution center or upon his arrival at the distribution center. (TR63). A driver may not refuse a dispatch. (TR836-837; CX 1, p. 21). But if fatigue is the cause of the failure to complete an assignment, that is not considered a refusal of a dispatch. (TR933). A driver is usually dispatched first to take a shipment to a store and return to the distribution center with an empty trailer. His next dispatch would be from the distribution center to a store where he would spend the night. (TR56-57).

Wal-Mart stores have receiving docks for trailers loaded with merchandise. (TR53-54). Unloading of trailers by store personnel usually occurs at night when customer traffic is light and freight can be staged in the store aisles without inconveniencing customers. (TR55-56). Unloading of trailers is generally scheduled two hours apart. For example, if a store receives three trailers, the first trailer may be scheduled to begin unloading at midnight. The second trailer would be scheduled for unloading at 2:00 a.m., and the third trailer would be scheduled to begin unloading at 4:00 a.m. (TR62-63). A driver must have the trailer at the dock no later than the scheduled unloading time irrespective of when he arrives at the store. (TR63). Throughout the afternoon and evening Wal-Mart drivers deliver trailers to stores. (TR58; TR63). These trailers are left unattended at a dock door until receiving personnel arrive in the evening to unload them. If a driver leaves a loaded trailer at a store he should back it against a closed dock or other fixed object to prevent access to the trailer doors. (CX1, p. 8).

Due to the volume of business, Wal-Mart stores often receive more trailers than they have available docks. (TR53; TR228). If a driver arrives at a store and no docks are available to place the trailer into, he is supposed to retire to his truck tractor and wait for a trailer to be unloaded. After a trailer is empty, the driver will then be alerted by the store that he can take the empty trailer from the dock and place the loaded trailer at the dock. (TR252). In Stauffer's case the process of exchanging trailers typically took twenty to thirty minutes. (TR797).

Wal-Mart's Private Fleet Driver Handbook stated that a driver may be terminated for "Refusing a dispatch (work) assignment. (CX1, p. 21). The handbook also contains a list of other severe infractions which "may result in immediate termination." (CX1, p. 21). Wal-Mart maintains the handbook so a driver will be aware of what is expected of him and the rules that he must follow. (TR946). Drivers are not automatically terminated for committing one of the infractions on page 21 of the handbook. Instead, a decision to terminate a driver is based upon the facts of each situation that is presented. (TR951).

Although the handbook prohibits rudeness, (CX1, p. 20) page 21 of the handbook does not list rudeness as an infraction that may merit immediate termination. Failing to secure a trailer is not listed as an infraction that may merit immediate termination, although Darwin once fired a driver who abandoned a trailer on a highway. (TR924-25; TR958-59). The handbook states that drivers must exchange trailers "in a safe and responsible manner to ensure that property is not damaged and people are not hurt." (CX1, p. 8).

For many infractions, Wal-Mart will "coach" a driver to correct behavior. (TR573). A driver who is rude will be coached, not fired, unless the rudeness is severe such as swearing. (TR874). Wal-Mart considers having a preventable accident a more severe offense than refusing a dispatch. (TR879). Drivers who have preventable accidents are not fired unless they have had several infractions. Instead, these drivers are coached. (TR943). Darwin once fired a driver who had a preventable accident, however his firing was subsequently rescinded. (TR963-65).

Wal-Mart evaluated the performance of its drivers annually. Stauffer's July 1997 Annual Evaluation noted that Stauffer "works well with our store & vendor partners." and that "Ron represents Wal-Mart & The Private Fleet Well." (CX5). Stauffer's 1998 Private Fleet Driver Evaluation stated that "Ron works well with stores and vendors" and "Ron represents Wal-Mart well." (CX6) Stauffer's 1997 and 1998 evaluations noted that he delivered all of his dispatches on time. (TR81; TR871). Stauffer never had any accidents or traffic violations while Wal-Mart employed him. (TR49).

Stauffer tried to avoid dispatches where he anticipated that he would be awakened from his sleep in order to exchange a loaded trailer with an empty trailer at a Wal-Mart store. (TR268). He made signs that he placed on the windows of his truck tractor stating "Do Not Wake-Up This Driver-AtAll-Federal Law" to dissuade store associates from waking him. (TR82; CX7).

Stauffer sent a letter to Marty Brower, Wal-Mart's safety director, about an incident where his sleep was interrupted. (CX9). Stauffer wrote other letters to Wal-Mart officials complaining about having his sleep interrupted. (TR705-707). Stauffer had a reputation as a crusader about safety and for resisting any interruption of his sleep. (TR267). According to Ms. Thornhill, Stauffer always made an issue of it. (TR822; TR832). Stauffer, over his eleven years with Wal-Mart, had been awoken by store personnel at least 500 times to spot a loaded trailer and often complained about the interruption of his biological rest. (TR 529, 389-409). Stauffer testified that he resisted these interruptions because he did not want to drive while he was not safe. (TR268). Darwin noted in a memo to Steve Prestridge on August 8, 1998, that "Ron has been on a 'crusade' to sway other fellow drivers to tell the store no when asked to move trailers in and out of the dock when asked! Ron tries to contend that our company does not care about safety ... Ron continually tried to steer the conversation toward his slanted version of an 8-hour break. . . " (CX 15).

In the summer of 1998, Stauffer started his workweek on Tuesday afternoons at the distribution center. Each workday he usually delivered a shipment to a store and then returned to the distribution center. He then delivered a second trailer in the evening to a store where he would spend the night in the truck tractor. The following morning he would return to the distribution center. At the distribution center he spent several hours taking care of paperwork, showering, exercising and handling personal affairs. In the afternoon this routine would begin again where he would deliver a trailer to a store, return to Brookhaven with an empty trailer, and then deliver a second trailer that

same day to another store where he would spend the night. (TR210). Stauffer testified that he usually began his rest between 10:00 p.m. and midnight, and slept until 7:00 a.m. or 8:00 a.m. the next morning. (TR96-97; TR210).[1]

On August 6, 1998, Stauffer made his first delivery to a store in Jena, Louisiana. After returning to the distribution center, he delivered his second trailer to Slidell, Louisiana, where he spent the night on August 6. (TR217-18). He slept about 7 ½ hours, awoke naturally without the use of an alarm and exited the sleeper berth of his truck tractor at about 8:45 a.m. on Friday, August 7, 1998. (TR222). After taking care of some personal hygiene matters and performing a vehicle inspection of his truck tractor and empty trailer, Stauffer drove from Slidell to Brookhaven. He made two personal stops along the way. Stauffer arrived at the distribution center at about noon on August 7, 1998. (TR223-24; CX10).

At about 12:45 p.m. on August 7, 1998, Stauffer was dispatched to take a trailer to a store in Gonzalez, Louisiana, return to Brookhaven with an empty trailer and then take a trailer to the store at Denham Springs, Louisiana, with a scheduled unloading time at 4:00 a.m. on August 8, 1998. (TR226). Stauffer knew from experience that the Denham Springs store had only two available dock doors and that he would be delivering the third trailer that night. (TR228). Stauffer quickly calculated that he would arrive at the Denham Springs store at about midnight on August 8, 1998, and that a dock door would not be available any earlier than 2:00 a.m. (TR229).

Stauffer testified that he told an associate at the distribution center named "Bonnie" that he would have to exchange trailers at the Denham Springs store in an impaired condition. (TR232-33). Stauffer testified that Ms. Thornhill was present and told him that an empty trailer would be available for him at midnight when he arrived at the store. (TR233). Ms. Thornhill denies this and testified that she called the store and verified that an empty would be available at 2 a.m. (TR824).[2] From experience, Stauffer knew a dock would not be available until 2 a.m. (TR228-229). Stauffer was off duty at the Brookhaven facility for several hours on August 7, 1998, but did not take a nap. (TR224).

Stauffer delivered his dispatch to Gonzalez and returned to Brookhaven. At about 10:00 p.m. he left Brookhaven for a second time that day, bound for the store at Denham Springs. (TR239). Stauffer arrived at Denham Springs at midnight on August 8, 1998. (TR244; CX10). On August 7, 1998, Stauffer drove 522 miles. (TR244; CX10).

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[1] On the morning of August 5, 1998, Stauffer was awake until 1a.m. changing trailers. (TR217). On the morning of August 7, Stauffer did not enter his sleeping berth until 12:45 a.m. (TR221).

[2] Because of the manner in which the night delivery system worked and Stauffer's knowledge that Denham Springs was a midnight store, I find Ms. Thornhill testimony more credible and that when Stauffer left for Denham Springs he was aware that he was not scheduled to back into the dock for unloading until 2 a.m. at the earliest.

Upon his arrival at the Denham Springs store two trailers were spotted in the receiving docks. (TR246). Stauffer spoke with store personnel at the rear of the trailer and asked which trailer was empty and informed the receiving personnel that he had a loaded trailer. Stauffer was told that an empty trailer would not be available until 2:00 a.m. (TR249). Stauffer responded that there was a problem, he was leaving and that they should lock the trailer. A store employee told Stauffer that someone would be right out to speak with him. (TR249-250). Outside the store facility Stauffer had a conversation with two receiving associates. They informed Stauffer that they were running ahead of schedule and they would have an empty available to him by 1-1:30 a.m. They told Stauffer that he could stay awake and spot the trailer then or he could take a nap and they would awaken him in a couple of hours to spot the trailer. Stauffer told them that he was not going to participate in that and that he was not going to switch the trailers after being woke up from his natural sleep. (TR250-253). Stauffer had very strong feelings regarding the importance of a full eight hours of sleep, and thus, informed the loading crew that he was not going to take the suggested nap. He was not going to suffer them disturbing his rest in order to change the trailers and thereby jeopardize his ability to drive unfatigued the next night. (RX12, pp. 33-39).

At about 12:20 a.m. on August 8, 1998, Stauffer called George Randle and told him that he was at the Denham Springs store, "that they did not have an empty [trailer] and that he was not getting woke up to put the trailer in the hole." (CX14). Stauffer told Randle that he no longer did interrupted sleep breaks. (RX14 p.2). Although Stauffer may have informed Randle that he had worked a long day at the end of a long workweek, Stauffer never used the word “fatigue” or “safety” in his conversation with Randle. (TR254; 880-881). Randle responded that the store would have an empty trailer available at 2:00 a.m. and "that it was his responsibility to put it [the loaded trailer] to the dock on time." (CX14). Randle put Stauffer on hold and telephoned Ruby Mabus, the assistant store manager. Ms. Mabus informed Randle that Stauffer had been extremely rude and unprofessional. She also stated the crew would work and have an empty available within twenty minutes. Randle informed Stauffer that a dock would be available within twenty minutes and absolutely no later than 1 a.m. and that Stauffer had two options: 1) he could wait twenty minutes, spot his trailer in the dock and then go to sleep; or 2) he could take a 2-3 hour nap and then spot the trailer. (TR855-859). Stauffer told Randle to write him up, said "good-bye" and then hung up the phone. (TR256). Stauffer's manner of speaking with Randle was abrupt and firm, but he was not unprofessional. (CX14). Stauffer then drove to another Wal-Mart store a few miles away. (TR258).

After Stauffer left the Denham Springs store Mabus called Randle and told him that Stauffer had dropped his trailer behind the store without securing it and had driven away. (CX14;TR862). Mabus told Randle that Stauffer had been rude with store personnel. Randle arranged for another Wal-Mart driver to exchange the loaded trailer with an empty trailer. The trailer was placed into the receiving dock by another Wal-Mart driver by 4:00 a.m. (TR855).

Randle sent Paul Darwin an e-mail message relating to him the events of that morning. (CX14). He also called Darwin at home and told him what had happened. (TR861-863;911). Randle reported that Stauffer called in and told Randle that he was going to bed and did not want to be disturbed. (TR912). Later that morning as Stauffer was driving to the distribution center he received

a call from Darwin. Darwin asked what happened and Stauffer said he had gotten to the store and wanted to take his break undisturbed. Darwin informed Stauffer that he wanted to meet with him when he arrived at Brookhaven. (TR261;915-917). Darwin also called Mabus and was informed that Stauffer had been rude and unprofessional. (TR917).

Darwin and Rick Dutton met with Stauffer in Darwin's office. Darwin told Stauffer that he was being fired and provided him with an Exit Interview Form. (TR264;CX12). The Exit Interview Form explained that Stauffer was terminated for "Refusal of a Dispatch Work Assignment (Insubordination)." (CX12). Stauffer asked Darwin if he was being fired. Darwin responded in the affirmative. (TR263-264). Stauffer testified that he began to explain to Darwin that he had been too tired to safely exchange the trailers at the Denham Springs store but Darwin did not listen to him. (TR264-265). Darwin testified that Stauffer was only concerned that his sleep would be disturbed. (TR913). When informed that he was being terminated, Stauffer went into a verbal rampage. (TR919; CX15). Darwin had security personnel escort Stauffer from the premises. (TR317). Stauffer then left the distribution center in his personal vehicle. (TR318).

A few hours after he fired Stauffer, Darwin sent a memo to Steve Prestridge, Wal-Mart's personnel manager. The memo noted that Stauffer was "defiant" and that he had liquidated Stauffer's employment "Due to refusing a dispatch work assignment and insubordination." The memo also noted that "Ron has been on a 'crusade' to sway other fellow drivers to tell the store no when asked to move trailers in and out of the dock when asked! Ron tried to contend that our company does not care about driver safety ... Ron continually tried to steer the conversation toward his slanted version of an 8-hour break . . . " (CX 15). Darwin was not aware of Stauffer's "crusade" until after the termination. (TR978).

On August 11, 1998, Stauffer found employment with Contract Freighters, Inc. Stauffer waited until September 1, 1998, to begin his employment with Contract Freighters while he explored his legal options concerning his termination by Wal-Mart. (TR320). Stauffer was employed by other carriers following his termination by Wal-Mart. Stauffer made $44,639.37 with Wal-Mart in 1998. (CX16, p. 1). He earned $ 44,331.31 from September 1, 1998 through December 31, 1999. (CX16). From January 1, 2000 through February 18, 2000, Stauffer earned $6,641.53 with Schneider Transport. (TR335; CX18).

Stauffer had been awakened to shuttle trailers at least 500 times and never had an accident or injured anyone. Nor was he aware of any accidents or injuries resulting for drivers being awakened to shuttle trailers. (TR529,530). Mr. Darwin had never heard of any accidents or injuries resulting from drivers being awakened to shuttle trailers during his 13 years with Wal-Mart. (TR989). There was no evidence presented at the hearing of any accidents or injuries resulting from drivers being awakened to shuttle trailers.

Lowell Ledoux was a Wal-Mart truck driver for eleven years and estimated that he had been awakened to spot trailers approximately 600 times. Other than running over a pallet or curbing a tire, he had never had an accident, injury or incident while spotting a trailer after having been awakened. (TR125). Ledoux did have one accident where he forgot to set the truck brakes when he arrived at a store. (TR115).

Troy Daigle was a Wal-Mart driver. He estimated that he spotted trailers approximately 1700 times after being awakened from his sleep. He was never involved in an accident which involved personal injury or property damage exceeding $400.00. (TR171). He had two incidents where he forgot to dolly the trailer down. One incident resulted in a cut tire and the other involved no damage. (TR171).

LAW AND CONTENTIONS

The Secretary has stated that the STAA should be interpreted liberally in order to promote an interpretation of the Act which is consistent with its Congressional intent, namely, the promotion of commercial motor vehicle safety on the nations highways. *See generally,* Boone v. TFE, Inc., 90-STA-7, (Sec'y. July 17, 1991) DOL Decs. Vol. 5, No. 4, p. 160, 161, *aff'd sub nom.*, Trans Fleet Enterprises, Inc. v. Boone, 987 F.2d 1000 (4th Cir. 1992); Somerson v. Yellow Freight Systems, Inc., 1998-STA-9 and 11 (ARB Feb.18, 1999).

The employee protection provisions of the STAA provide in relevant part:

(a) Prohibitions — (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, privileges or employment, because --

> (A) ...
>
> (B) the employee refused to operate a vehicle because--
>
> > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> >
> > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicles unsafe condition.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.

49 U.S.C.A. §31105(a).

In order to establish a prima facie case for relief under the STAA, an employee must show that he engaged in protected conduct, that he was subject to adverse employment action, that his employer was aware of the protected conduct when it took the adverse action, and must present evidence sufficient to raise the inference that the protected conduct was the likely reason for the adverse action. Ertel v. Giroux Brothers Transportation, Inc., 88 STA-24 (Sec'y. Feb 16, 1989); Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987).

It is undisputed that Stauffer was terminated, which is an adverse employment action. The focus of the dispute is, therefore, whether Stauffer's refusal to shuttle the trailers was a protected activity, whether Wal-Mart was aware of the protected conduct when it terminated Stauffer and whether the protected conduct was the likely reason for the termination.

STAUFFER'S REFUSAL TO SHUTTLE TRAILERS WAS NOT PROTECTED ACTIVITY

The primary agency responsible for regulating trucking industry practices under the STAA is the Department of Transportation (DOT). *See* 49 U.S.C.A. §§31136, 31502. Part 392 of Title 49 of the Code of Federal Regulations, Driving of Commercial Motor Vehicles, includes diverse rules dealing generally with safety. One is the DOT's "fatigue" rule, which provides in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. §392.3 (1999). [3]

Thus, under the employee protection provisions of the STAA enforced by the Secretary of Labor, it is unlawful for an employer to impose an adverse action on an employee who has refused to operate a vehicle because operating the vehicle would violate DOT regulations or because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C.A. §31105(a)(1)(B).

Section 405(a)(1)(B)(i): Violation of a Safety Regulation

STAA §§405(a)(1)(B)(i) protects a driver's refusal to operate a vehicle because "the operation violates a regulation [or] standard . . . related to commercial motor vehicle safety or health." This provision of STAA is often referred to as the "actual violation" clause because to establish a violation

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[3]The Department of Transportation also regulates the maximum number of hours that drivers may work, under rules found at 49 C.F.R. Part 395, Hours of Service of Drivers. As a general rule, a driver can be "on duty" (i.e. waiting to drive, inspecting the vehicle, loading/unloading, driving, waiting for vehicle repair, etc.) no more than 15 hours after an eight-hour rest period, and may drive no more than 10 hours during the "on duty" period. 49 C.F.R. §395.3(a). Complainant does not allege a violation of the hours of service rules.

of subsection (B)(i), the complainant "must show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive." Yellow Freight Systems v. Martin [Spinner], 983 F.2d 1195, 1199 (2d Cir. 1993). Stauffer rests his claim, under the STAA "actual violation" clause, on a violation of the DOT fatigue rule, which is a federal motor vehicle safety standard within the meaning of STAA §§405(a)(1)(B)(i). Yellow Freight System, Inc. v. Reich [Hornbuckle], 8 F.3d 980, 984 (4th Cir. 1993).

The plain language of the fatigue rule covers a driver who, while not presently fatigued, anticipates that his ability or alertness is "so likely to become impaired, through fatigue . . . as to make it unsafe for him to begin or continue to operate the commercial motor vehicle." 49 C.F.R. §§392.3. Neither Somerson nor prior Secretary and Board decisions exclude coverage of claims under subsection (B)(i) that are predicated on anticipatory fatigue. Instead, these cases stand for the proposition that a complainant must provide some proof that his ability will likely become impaired due to fatigue. As the Board noted in Somerson: "most of the cases in which the Secretary or Board has ruled against a complainant asserting fatigue or illness retaliation claims have involved drivers who refused to work *in anticipation of becoming* fatigued, without evidence to support that anticipation." The converse, however, is also true: that a complainant who produces sufficient evidence in support of a future fatigue claim could establish that a refusal to drive was protected activity.

In order to prove a fatigue related claim under subsection (i), a complainant must prove the operation of the vehicle would in fact violate the specific requirements of the fatigue rule. As the court held in Cortes v. Lucky Stores, Inc., slip. op. at 4 (*quoting* Yellow Freight Systems v. Martin, 983 F.2d 1195,1199 (2d Cir. 1993):

> To establish a violation of the provision at Subsection (B)(i) of the STAA, a complainant "must show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive — *a mere good faith belief in a violation does not suffice*." (emphasis added)

A violation of this provision is established where it is proven that the driver's "ability or alertness was so impaired as to make vehicle operation unsafe." Smith v. Specialized Transportation Services, Case No. 91-STA-22, Sec. Final Dec. and Ord., Apr. 30, 1992, slip op. at 6.

I find that Stauffer was not suffering from fatigue nor anticipating fatigue as to make it unsafe for him to shuttle the trailers. I note that Stauffer's stated concern on the morning of August 8 was that he would be awakened from his sleep to shuttle trailers. Stauffer told the loading crew that he was not going to switch the trailers after being woke up from his natural sleep and he was not going to suffer them disturbing his rest in order to change the trailers. Stauffer told Randle that he was not going to get woke up to put the trailer in the hole and that he no longer did interrupted sleep breaks. With Darwin, Stauffer's only concern was that his sleep would have been disturbed. In none of these discussions was fatigue or safety mentioned.

I question Stauffer's testimony as to the extent of his fatigue. While he testified as to having worked eleven days with only one day off, in fact Stauffer awoke from natural sleep on Sunday morning, drove a couple of hours back to Brookhaven, then had the remainder of Sunday off. He had the entire day off on Monday and reported to work on Tuesday afternoon. Each night for the rest of the week leading up to August 8, Stauffer got a full night's sleep and awoke naturally without the use of an alarm. There is no evidence to indicate that Stauffer was prevented from sleeping longer in the mornings if he was not rested. And he could have taken a nap prior to leaving on his dispatches on August 7. While Stauffer detailed factors that would make him more fatigued from driving, most of these factors were not present on August 7. While Stauffer would want me to believe that he normally goes to bed between 10 p.m. and midnight and that at exactly 12:30 a.m. his body is suddenly overwhelmed by fatigue, the fact is that on two nights in the week when evidence is available he was awake past 12:45 a.m. Having observed his demeanor and the argumentative, contradictory and unclear nature of his testimony, I find Stauffer's testimony regarding his level of fatigue and anticipated fatigue to be less than credible.[4]

I find that Stauffer was not concerned with being fatigued nor did he anticipate fatigue. His only concern, as was reflected in several years of crusading and in his statements made on August 8, was being awakened from his sleep. Stauffer refused to shuttle the trailers, not because of fatigue or anticipated fatigue, but because he decided he no longer did interrupted sleep breaks.[5] In Brandt v. United Parcel Service, 95-STA-26 (Sec'y Oct. 26, 1995), Brandt refused on Saturday to take an assignment on Sunday evening on the ground that he would be too fatigued to drive safely, as a result of having to change his sleeping patterns. The Secretary held that a "refusal to drive based on a refusal to shift one's sleep pattern is not the type of activity protected under Section 405." Likewise, in Somerson, Somerson claimed Yellow Freight's call block system interfered with his regular sleep patterns and frequently caused him to be fatigued when called for dispatch. Somerson argued that Yellow Freight's requirement that casual drivers be available for dispatch during the first call block after completion of the eight hour mandated rest period *inevitably* resulted in a situation in which drivers were pressured to drive in a dangerously fatigued condition. In Somerson the Board held that "to the extent that Somerson is arguing generally that Yellow Freight's casual driver dispatch system –which complies with DOT Hours of Work regulation– nonetheless is deficient because it inevitably results in a violation of a second DOT regulation – the fatigue rule – we believe that his challenge is addressed to the wrong forum. . . In essence, by raising a general challenge to the dispatch system as creating a problem with chronic driver fatigue, Somerson is arguing that the DOT Hours of Service

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[4] I found Dr. Richert's testimony to be of very little help. Dr. Richert is an expert in sleep disorders. There is no evidence that Stauffer has a sleep disorder. (TR420). Dr. Richert testified about the effects of sleep debt. However, Stauffer was able to sleep every night and awaken naturally. There is no evidence that Stauffer could not have slept longer if needed nor that Stauffer had a propensity to fall asleep.

[5] 49 C.F.R. §395.1(g) specifically allows for a driver to accumulate his eight hour break in two segments, each segment to be no less than two hours. There is no allegation that this provision has been violated.

regulation needs to be modified to insure that drivers have predictable rest schedules. We express no opinion on the merits of Somerson's argument, but simple not that this Board has neither the authority nor the expertise to address this issue, which is entrusted by statute to the Department of Transportation."

I also note that Stauffer was given options. Randle informed Stauffer that a dock would be available within twenty minutes and absolutely no later than 1:00 a.m. and that Stauffer could wait twenty minutes, spot his trailer in the dock and then go to sleep or he could take a 2-3 hour nap and then spot the trailer. In Byrd v. Consolidated Motor Freight, 97-STA-9 (ARB May 5, 1998), Byrd refused to take a sleeper run because he believed he would become too fatigued to drive safely. The Board held that it was unreasonable for the well rested Byrd to be apprehensive about public safety because if he became too fatigued to drive during his assigned shift he could have stopped the truck and rested without repercussion. Similarly, in the event Stauffer did not wish to remain awake for an extra 30 -60 minutes to shuttle the trailers, he had the option of taking a 2-3 hour nap prior to being awakened to shuttle the trailers.

I find that by waiting until an empty trailer was available, Stauffer's "ability or alertness was not so likely to become impaired through fatigue . . . as to make it unsafe for him" to swap the trailers. I just do not believe Stauffer's self-serving testimony that he was fatigued or that he anticipated fatigue which would make it unsafe for him to shuttle the trailers safely. I find that when Stauffer received his dispatch at noon on August 7 he did not anticipate fatigue as he testified, but he anticipated that he would be awakened from his sleep to shuttle trailers. He then decided to take a stand against drivers being awakened to shuttle trailers. Stauffer's refusal to shuttle the trailers was not protected activity under Section 405(a)(1)(B)(i).

Section 405(a)(1)(B)(ii): Reasonable Apprehension of Serious Injury

STAA §§405(a)(1)(B)(ii) protects a driver who refuses to operate a vehicle because the driver "has a reasonable apprehension of serious injury to [himself/herself] or the public because of the vehicle's unsafe condition." In Robinson v. Duff Truck Line, Inc., Case No. 86-STA-3, Sec'y Final Dec. and Ord., March 6, 1987, *aff'd sub nom.* Duff Truck Line, Inc. v. Brock, 848 F.2d 189 (6th Cir. 1988) (Table), the Secretary broadly construed this provision to cover "conditions, which make operation of a commercial vehicle on the road a safety hazard." Slip op. 9. In Robinson the condition was hazardous weather. Elsewhere, the Board has noted that violations of the reasonable apprehension clause involve more than engine defects, failed brakes, and other problems with the mechanical parts of a motor vehicle; the clause is intended "to assure that employees are not forced . . . to commit unsafe acts." Garcia v. AAA Cooper Transportation, ARB Case No. 98-162, ALJ Case No. 98- STA-23, Final Dec. and Ord., slip op. 4, (Dec. 3, 1998) (*quoting* Bryant v. Bob Evans Transportation, Case No. 94-STA-24, Sec'y Final Dec. and Ord., slip op. 7, April 10, 1995). *See also,* Thom v. Yellow Freight System, Inc., Case No. 93-STA-2, Sec'y Final Dec. and Ord., slip op. 6, November 19, 1993, *aff'd sub nom.* Yellow Freight System, Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994) (§§405(a)(1)(B)(ii) should be construed broadly to apply to conditions rendering operation of a commercial motor vehicle hazardous).

In Somerson the Board held that the broad scope of §§405(a)(1)(B)(ii), articulated in Robinson and its progeny, also encompassed situations where a driver's physical condition (including present or anticipated fatigue) causes an employee to have "a reasonable apprehension of serious injury to the employee or the public." Thus Stauffer's refusal to drive his vehicle could constitute protected activity under §§405(a)(1)(B)(ii) if he had a "reasonable apprehension" of serious injury based upon the present or future level of his fatigue.

STAA §§405(a)(2) contains the following criteria for evaluating the subsection (B)(ii) "reasonable apprehension" standard: "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." In Somerson the Board explained:

> under this standard, a driver's claim of fatigue, standing in isolation and without context, is insufficient for protection under the STAA to attach. Instead the Secretary, and now the Board, examines the facts surrounding each incident to determine if a reasonable person in the circumstances would have been justified in refusing an assignment due to fatigue.

Somerson, slip op. 15.

The protection under subsection (ii), which is applicable whenever there is a serious safety issue, is considerably broader and remains applicable even when the DOT safety regulations do not directly and specifically address the safety concern. However, in order to prove a fatigue related claim under subsection (ii), a complainant must prove that "a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove." Byrd v. Consolidated Motor Freight, ARB Case No. 98-064, ALJ Case No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998, appeal filed, May 27, 1998 (11th Cir.).

Under this standard, a driver's claim of fatigue, standing in isolation and without context, is insufficient for the protection found under the STAA to attach. Instead, the facts surrounding each incident must be examined to determine if a reasonable person in the same circumstances would have been justified in refusing the assignment due to fatigue.

I first note the previous finding that Stauffer was not suffering from fatigue nor anticipating fatigue as to make it unsafe for him to shuttle the trailers. I also find that a reasonable driver, in the circumstance confronting Stauffer, reasonably would not have concluded that he would be too fatigued to operate his vehicle safely under the circumstances that Stauffer anticipated. Several factors support this conclusion. First, Stauffer was not going to be driving for a long period of time on the public highway. The activity that Stauffer refused consisted of moving trailers short distances in the Wal-Mart parking lot. A reasonable person would certainly recognize that there was less danger of an accident in the parking lot than out on the highway.[6] If Stauffer had taken the option of staying

[6] While I find the STAA is applicable to public parking lots such as Wal-Mart's, as stated previously, the Congressional intent for the STAA is the promotion of commercial motor vehicle safety on *the nations highways.*

awake until 1 a.m. and then shuttling the trailer, he could have partaken in any number of activities to remain alert. Given the short wait until an empty would be available, a reasonable person in the circumstances would not have been justified in refusing the assignment due to fatigue or anticipated fatigue.

Especially when Stauffer was given another option. The other option allowed him to sleep for 2-3 hours before he shuttled the trailers. As the Board stated in Byrd, it was unreasonable to be apprehensive about public safety if the driver had the option to rest without repercussion. Given the option to take a 2-3 hour nap, no reasonable person in the same circumstances would conclude that there was a reasonable apprehension of serious injury if he shuttle the trailers.

Also, there was no evidence presented at the hearing of any accidents or injuries resulting from drivers being awakened to shuttle trailers. Stauffer himself had been awakened to shuttle trailers at least 500 times and never had an accident or injured anyone. Nor was he aware of any accidents or injuries resulting for drivers being awakened to shuttle trailers. The lack of previous accidents is further proof that Stauffer's alleged apprehension on the evening of August 7 was not reasonable.

Even if Stauffer did engage in protected activity (which I find he did not), Wal-Mart was not aware that Stauffer refused to drive because of fatigue or anticipated fatigue when Stauffer was terminated. As noted previously, Stauffer told the loading crew that he was not going to switch the trailers after being woke up from his natural sleep and he was not going to suffer them disturbing his rest in order to change the trailers. Stauffer told Randle that he was not going to get woke up to put the trailer in the hole and that he no longer did interrupted sleep breaks. With Darwin, Stauffer's only concern was that his sleep would have been disturbed. In none of these discussions was fatigue or safety mentioned. While there is certainly no requirement that these words be specifically stated, Stauffer must prove that Wal-Mart was aware of the protected activity when he was terminated. The information available to Wal-Mart at the time Stauffer was terminated indicated that he was refusing to shuttle the trailers because of his aggravation at being awakened from his sleep. As per Byrd, that is not protected activity.

Accordingly, I find that Stauffer has failed to establish a prima facie case under the STAA and recommend that the Secretary enter the following order pursuant to 29 C.F.R. §1978.109(c)(4):

ORDER

The complaint of Ronald C. Stauffer is **DENIED.**

SO ORDERED.

LARRY W. PRICE
Administrative Law Judge

]NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board , U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).